

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 02-4161

United States of America,

Appellee,

v.

Martin Martinez-Tapia, also known as
Victor Rene Madrid, also known as
Jorge Tapia,

Appellant.

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Appeal from the United States
District Court for the
Northern District of Iowa.

[UNPUBLISHED]

Submitted: June 26, 2003

Filed: July 1, 2003

Before BOWMAN, BYE, and RILEY, Circuit Judges.

PER CURIAM.

Martin Martinez-Tapia pleaded guilty to illegal reentry of the United States following deportation for “the felony crime of attempted burglary, 3rd degree . . . for which he was sentenced to two years jail, suspended,” in violation of 8 U.S.C. § 1326(a) and (b)(1), (2). The district court¹ sentenced him to 41 months imprisonment and 2 years supervised release. Counsel has moved to withdraw and

¹The Honorable Donald E. O’Brien, United States District Judge for the Northern District of Iowa.

filed a brief under Anders v. California, 386 U.S. 738 (1967), arguing that the district court plainly erred in finding that Martinez-Tapia's prior conviction for attempted third-degree burglary was a "felony" conviction warranting a 16-level increase under U.S.S.G. § 2L1.2(b)(1)(A). Counsel points out that under Iowa law, Martinez-Tapia's sentence, assuming a full award of good-time credit, would have been discharged in less than one year.

We review this argument, raised for the first time on appeal, for plain error. See United States v. Montanye, 996 F.2d 190, 192 (8th Cir. 1993) (en banc). Section 2L1.2 provides for a 16-level increase if the defendant was deported after "a conviction for a felony that is (ii) a crime of violence." See U.S.S.G. § 2L1.2(b)(1)(A)(ii). Commentary defines "felony" as "any federal, state, or local offense punishable by imprisonment for a term exceeding one year." See U.S.S.G. § 2L1.2, comment. (n.1(B)(iv)). Under Iowa law, "[a]ttempted burglary in the third degree is an aggravated misdemeanor." See Iowa Code Ann. § 713.6B (West Supp. 2003). The Iowa penalties section provides, "When a person is convicted of an aggravated misdemeanor, and a specific penalty is not provided for, the maximum penalty shall be imprisonment not to exceed two years [When] the court imposes a sentence of confinement for a period of more than one year the term shall be an indeterminate term." See Iowa Code Ann. § 903.1(2) (West Supp. 2003).

The district court did not plainly err in concluding that the offense was a "felony" for purposes of section 2L1.2's 16-level increase. Federal law controls the issue, see United States v. Jenkins, 989 F.2d 979, 979 (8th Cir. 1993) ("How a state views an offense does not determine how the United States Sentencing Guidelines view that offense."); cf. United States v. Johnson, 12 F.3d 760, 766 (8th Cir. 1993) (whether prior sentence counts for criminal history purposes is question of federal law, not state law), cert. denied, 512 U.S. 1211 (1994), and the Guidelines definition of "felony" requires only that the offense be punishable by imprisonment for more than one year, which the Iowa statute clearly permits.

Having reviewed the record independently under Penson v. Ohio, 488 U.S. 75 (1988), we find no nonfrivolous issues. Accordingly, we affirm, and we grant counsel's motion to withdraw.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.